No. 90-259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM LOWARY and SARA WYATT,
Petitioners,

v.

LEXINGTON TEACHERS ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF RESPONDENTS LEXINGTON TEACHERS ASSOCIATION AND OHIO EDUCATION ASSOCIATION IN OPPOSITION

ROBERT H. CHANIN
JEREMIAH A. COLLINS *
BREDHOFF & KAISER
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

IRA MIRKIN
GREEN, HAINES, SGAMBATI,
MURPHY & MACALA CO., L.P.A.
P.O. Box 849
Youngstown, OH 44503

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Should this Court review the decision of the court below, which is in accord with the position taken by every other court that has addressed the issue, that petitioners are not entitled to a refund of that portion of their fair share [*i.e.*, agency shop] fees attributable to clearly chargeable activities by respondent unions despite the fact that there were certain defects in the procedure used by the unions to collect said fees?

2. Should this Court review the decision of the court below to allow the refundable portion of petitioners' fair share fees to be determined in the first instance by the impartial decisionmaker provided for in the unions' collection procedure, when petitioners raised only *procedural* challenges and did not challenge the *amount* of the fees, when the impartial decisionmaker aspect of the unions' collection procedure was found to be constitutional in a ruling that is not challenged by petitioners, and when this issue is not significant or likely to recur?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-259

WILLIAM LOWARY and SARA WYATT,
Petitioners,

v.

LEXINGTON TEACHERS ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF RESPONDENTS LEXINGTON TEACHERS ASSOCIATION AND OHIO EDUCATION ASSOCIATION IN OPPOSITION

Respondents Lexington Teachers Association and Ohio Education Association submit this brief in opposition to the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

A. Background

Petitioners William Lowary and Sara Wyatt were employed as teachers by the Lexington Local Board of Education ("School Board") during the 1985-86, 1986-87, and 1987-88 school years. Pursuant to Ohio law, respondent Lexington Teachers Association ("LTA") was recognized by the School Board as the exclusive collective bargaining representative for a unit consisting of the

teachers employed in the school district. Petitioners were included in this unit, but chose not to join LTA.

During the three years in question, the collective bargaining agreement between the School Board and LTA contained a provision pursuant to which members of the bargaining unit who did not become members of LTA would, in lieu of membership dues, have a fair share (*i.e.*, agency shop) fee deducted from their salaries. In conjunction with this provision, LTA established a collection procedure through which any teacher who objected to paying the full fair share fee could pay a reduced amount.[1] The procedure was revised from year to year as LTA endeavored, in the words of the District Court, "to have in place a fair share fee provision that complied with the current state of the law." Appendix to Petition for a Writ of Certiorari ("Pet. App.") 134a.

In *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), decided on March 4, 1986, this Court articulated for the first time "the constitutional requirements for [a union's] collection of agency fees." *Id.* at 310. A few weeks later, petitioners filed this action under 42 U.S.C. § 1983, asserting that LTA's procedure for collecting fair share fees did not "comply with the mandate of . . . *Hudson*." Complaint, ¶ 3.

B. Proceedings Below

1. *Procedural Violations*

The courts below ruled that certain aspects of the procedure used by LTA to collect fair share fees from petitioners did not pass muster under *Hudson*, and they fashioned a remedy to deal with the violations. Although

---

[1] The procedure was developed by respondent Ohio Education Association ("OEA"), LTA's statewide parent organization, and several aspects of the procedure were administered by OEA. For simplicity in discussion, we will use the term "LTA" to encompass OEA as well as LTA.

the Petition for a Writ of Certiorari relates only to these remedial rulings,[2] there is one aspect of the LTA collection procedure that is relevant to the questions presented —namely, the opportunity afforded objecting feepayers to challenge the amount of the fair share fees before an impartial decisionmaker—and we briefly recount the proceedings below with regard to this aspect.

Under LTA's pre-*Hudson* fair share fee collection procedure, the determination of the portion of the fee to be rebated to objectors as nonchargeable was made by a member of the National Academy of Arbitrators selected by LTA. *See* Joint Stipulation, ¶ 36, and Exhibit 4 thereto at 1-4. Numerous decisions of the lower federal courts had upheld the use of such a selection procedure. *See, e.g., Robinson v. State of New Jersey*, 741 F.2d 598, 613 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985); *Dolan v. Rockford School District*, No. 84-20209 (N.D. Ill. Aug. 19, 1985); *Kempner v. Dearborn Local 2077*, 337 N.W.2d 354 (Mich. 1983), *appeal dism'd*, 469 U.S. 926 (1984); *Association of Capitol Powerhouse Engineers v. Division of Building and Grounds*, 570 P.2d 1042 (Wash. 1977); *Reid v. United Auto Workers*, 479 F.2d 517 (10th Cir.), *cert. denied*, 414 U.S. 1076 (1973). In *Hudson*, this Court took a contrary position, holding that an arbitrator selected through "the Union's unrestricted choice" is not a constitutionally adequate decisionmaker in a union's fair share fee collection procedure. 475 U.S. at 308.

In August 1986, a few months after *Hudson* was decided, LTA adopted a new collection procedure. This procedure was adopted on the advice of counsel, who "advised . . . that the new procedure complied with the *Hudson* decision and other applicable federal law." Joint Stipulation, ¶ 59. The new procedure differed from

---

[2] LTA has not filed a cross-petition, and the rulings of the court below as to the merits of LTA's procedure are not at issue in this Court.

the previous one in several respects, including the fact that the arbitrator who would determine the amount of the fee to be charged to objectors was selected not by LTA, but by the American Arbitration Association ("AAA"). *Id.*, ¶¶ 47-49 and Exh. 13 thereto. LTA decided to use this AAA selection process to resolve not only the 1986-87 objections, but also the 1985-86 objections, which still were pending when the new procedure was adopted. Joint Stipulation, ¶¶ 47-49, 59. The District Court held that the use of the AAA to select an arbitrator satisfied constitutional requirements, Pet. App. 70a, and this ruling was not challenged on appeal.[3]

2. *Refund Rulings*

The rulings of the court below that are the subject of the Petition for a Writ of Certiorari relate to petitioners' request for a full refund of all fair share fees collected from them for the 1985-86 and 1986-87 school years. Although it was undisputed that LTA had engaged in many activities for which petitioners lawfully could be charged, petitioners argued that because there were certain defects in the procedure that was used by LTA to collect their fair share fees, LTA should be required to return the entire amount collected, with the result that petitioners would pay no fees at all for the years in question. The District Court rejected this argument, directing LTA to refund only the nonchargeable portion of the fees collected. The court ruled, moreover, that the amount to be refunded should in the first instance be as determined by the AAA-selected arbitrator under the LTA collection procedure. Pet. App. 115a-116a, 134a-135a.

---

[3] On November 9, 1987, in response to the July 1987 decision of the Sixth Circuit in *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987), LTA revised its collection procedure once again to comply with that decision. The impartial decisionmaker aspect of the LTA collection procedure was not changed as a result of *Tierney*. Pet. App. 101a.

The Sixth Circuit affirmed the District Court's rulings on the refund question, stating that its "primary concern" was that "awarding total restitution to plaintiffs will undermine the policy concerns of *Abood* [*v. Detroit Board of Education*, 431 U.S. 209 (1977)]" because "[one] objective of *Abood* . . . is 'to require every employee to contribute to the cost of collective-bargaining activities.'" Pet. App. 19a, quoting 431 U.S. at 237. Noting that "*Hudson* leaves undisturbed the traditional rule that the proper remedy for an unconstitutional fee collection is not a refund of the total fee, but 'the refund . . . of a portion of the exacted funds in the same proportion that union [chargeable] expenditures bear to total union expenditures,'" Pet. App. 19a, quoting *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963), the court below pointed out that "the *Hudson* Court refused to rule that a complete escrow was required after an objection precisely because '[s]uch a remedy has the serious defect of depriving the Union of access to some . . . funds that it is unquestionably entitled to retain.'" Pet. App. 19a, quoting *Hudson*, 475 U.S. at 310.

The Sixth Circuit also rejected petitioners' contention that a total-refund remedy is required in order to deter future violations of the procedural rights established in *Hudson*. The court observed that "[t]his argument in favor of full recovery was rejected in both *Carey v. Piphus*, 435 U.S. 247 . . . (1978), and *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 . . . (1986)." Pet. App. 19a. "Specifically, the Supreme Court held that '[t]o the extent . . . Congress intended that [the] awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages.'" Pet. App. 19a-20a, quoting *Carey*, 435 U.S. at 256-57.

The court below therefore concluded:

> If lawful collection procedures had been used, plaintiffs would have had to pay a fair share fee based on

> the union's chargeable expenditures. To allow plaintiffs to recover for both chargeable and nonchargeable expenditures would constitute a windfall to plaintiffs. [Pet. App. 20a].

Finally, the Sixth Circuit held that it was not improper for the District Court to have based the chargeable amount of the fair share fees for the years in question on the decision of the arbitrator under the LTA collection procedure. The Sixth Circuit noted that "[i]n this case . . . , plaintiffs do not claim that the decisionmaker's determinations were improper." Pet. App. 20a-21a. "Rather, plaintiffs only object to the use of the procedure," *id.* at 21a; and the aspect of the LTA procedure that was used to determine the chargeable amount (*viz.*, a decision by an arbitrator selected by the AAA) had been approved as constitutional by the District Court in a ruling petitioners did not challenge on appeal. *Id.* The court below acknowledged, however, that the arbitrator's determination "would not receive preclusive effect in a subsequent § 1983 action," Pet. App. 20a, quoting *Hudson*, 475 U.S. at 308 n.21.

REASONS FOR DENYING THE WRIT

Petitioners' demand for a total refund of their fair share fees is squarely at odds with the general remedial principles that this Court has held to be applicable in every § 1983 case, as well as with this Court's specific holdings in fair share fee cases that remedies should not result in objectors receiving a "free ride." Nor is there any conflict in the lower courts on this question. Part I, *infra*. Petitioners' contention that the District Court should itself have made the determination of the chargeable amount is likewise without merit: it ignores the fact that petitioners did not in this lawsuit challenge the *amount* of the fair share fees but only LTA's *procedures*, and none of the procedures found to be unlawful had any impact on the arbitrator's calculation of the chargeable amount. Moreover, because this question is neither sig-

nificant nor likely to recur, it does not in any event warrant review by this Court. Part II, *infra*.

I. THE SIXTH CIRCUIT'S REFUSAL TO REQUIRE A TOTAL REFUND OF PETITIONERS' FAIR SHARE FEES WAS CLEARLY CORRECT UNDER THIS COURT'S DECISIONS, AND PRESENTS NO CONFLICT WITH OTHER LOWER COURT RULINGS

A. The principle that governs remedies in § 1983 cases is that monetary relief may be awarded only "to *compensate* persons for injuries *caused by* the deprivation of [constitutional] rights." *Carey v. Piphus*, 435 U.S. 247, 255 (1978). *Accord, Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986). The proper application of this principle in the present context—*i.e.*, where a plaintiff who has been deprived of liberty or property without proper procedures demands restitution of what was taken—was settled in *Carey*: a court should not order the liberty or property to be restored to the plaintiff if the deprivation would have occurred even had proper procedures been followed, for "in such a case, the failure to accord [proper procedures] could not properly be viewed as the cause of the [deprivation]." *Carey*, 435 U.S. at 260. *See also Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 285-87 (1977).

It is undisputed, as the Sixth Circuit noted, that "[i]f lawful collection procedures had been used, plaintiffs would have had to pay a fair share fee based on the union's chargeable expenditures." Pet. App. 20a. Thus, to require a refund of the chargeable portion of the fair share fees "would constitute a windfall to plaintiffs," *id.*, and such a remedy is precluded by *Carey* and *Stachura*.

Petitioners' assertion that only a full refund would "avoid recurrences of the unions' repeated unconstitutional conduct," Pet. at 8, is wide of the mark, given the District Court's finding that LTA endeavored at all times "to have in place a fair share fee provision that com-

plied with the current state of the law." Pet. App. 134a.[4] And in any event, as the Sixth Circuit pointed out, this very argument was rejected in both *Carey* and *Stachura*, where this Court held that "[t]o the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages"—*i.e.*, damages for injuries actually caused by the violation. *Carey*, 435 U.S. at 256-57. *See also Stachura*, 477 U.S. at 310.[5]

B. The windfall sought by petitioners would be especially inappropriate here, because it would provide precisely what fair share fee arrangements are intended to prevent—namely, a "free ride" for objectors. As this Court has stated, such arrangements serve "important government interests," *Abood*, 431 U.S. at 225, by "requiring employees who obtain the benefit of union representation to share its cost," *id.* at 219, thereby "distribut[ing] fairly the cost of [representational] activities among those who benefit, and . . . counteract[ing] the incentive that employees might otherwise have to become 'free riders'—to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees," *id.* at 222. In this case, petitioners have "obtain[ed] benefits of union representation that necessarily accrue[d] to all employees"

[4] LTA's inability to predict the ever-changing legal landscape in this field hardly bespeaks an intent to violate the law. *See supra* at 3. Moreover, the District Court explicitly found that petitioners had presented no evidence to support an award either of compensatory damages (beyond the return of the nonchargeable portion of the fees collected) or punitive damages. Pet. App. 115a-116a, and those findings were not challenged on appeal.

[5] Of course, *punitive* damages are available under § 1983 upon a proper showing, *see Smith v. Wade*, 461 U.S. 30 (1983), but petitioners do not challenge the District Court's finding that no such showing was made in this case. *See supra* note 4.

in each of the years in question. By insisting that they should be allowed "to refuse to contribute to the union" for those years, petitioners ignore totally the important public interests recognized in *Abood*.

Hudson is particularly instructive with regard to the question of remedy. In *Hudson*, this Court stated that "the objective" in a fair share case is not only "to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto," but to do so "*without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.*" 475 U.S. at 302 (emphasis added), quoting *Abood*, 431 U.S. at 237. *Hudson* applied that very principle when it held that a union should not be required to escrow an objector's entire fee because "such a remedy has the serious defect of depriving the Union of access to some . . . funds that it is unquestionably entitled to retain." 475 U.S. at 310. Petitioners' proposed remedy, which calls for a 100% *refund* rather than a 100% *escrow*, suffers from that same defect to an even greater degree. In short, *Hudson* reaffirms the prior decisions in which this Court squarely has held that where a union has not complied with the legal requirements applicable to fair share fees, the proper remedy is not a refund of the total fee, but "the refund . . . of a portion of the exacted funds in the same proportion that union [nonchargeable] expenditures bear to total union expenditures." *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963). *Accord, Machinists v. Street*, 367 U.S. 740, 775 (1961). *See also Abood*, 431 U.S. at 238-42.[6]

---

[6] In their Petition at 8-9, petitioners assert that "an agency shop is a creature of statute and contract only," and that a union's interest in collecting fair share fees is a "mere contractual claim" that should be given no consideration in fashioning a remedy. Petitioners overlook that this "mere contractual claim" serves important government interests, and that this Court repeatedly has admonished against the fashioning of remedies that fail to take account of those interests.

C. Petitioners' assertion that the lower courts are divided on this issue, *see* Petition at 10-12, is fanciful. Their contention that the Sixth Circuit's decison conflicts with that court's prior decision in this same case, *see* Petition at 11, citing *Lowary v. Lexington Board of Education*, 854 F.2d 131 (6th Cir. 1988) ("*Lowary I*"), was properly rejected by the panel below, *see* Pet. App. 19a. Petitioners' contention that there is a conflict between the Sixth Circuit's decision and decisions of district courts *within the Sixth Circuit*, *see* Petition at 11-12, citing *Gillespie v. Willard City Board of Education*, 700 F. Supp. 898 (N.D. Ohio 1987) and *Jordan v. City of Bucyrus*, 739 F. Supp. 1124 (N.D. Ohio 1990), is equally unavailing. *Gillespie* and *Jordan* (like *Lowary* I) involved situations where, at the time of decision, the union still had not established an acceptable procedure to determine the amount of the fair share fees properly owing. The same is true of *Toledo Federation of Teachers v. Gibney*, 40 Ohio St. 3d 152, 532 N.E.2d 1300 (1989), cited in the Petition at 11. As the Sixth Circuit put it in this case, none of the cited decisions sanctions what petitioners seek here—"a free ride after appropriate procedures for determining the proper fee amount were established." Pet. App. 19a.[7]

The reality is that every other court that has addressed this question has reached the same result as the court below. *See Gilpin v. AFSCME*, 875 F.2d 1310, 1313-16 (7th Cir. 1989) (Posner, J.) (full refund would be "a severely punitive remedy . . ., not one properly described as restitution at all," because "[t]he plaintiffs do not purpose to give back the benefits that the union's efforts bestowed on them"), *cert. denied sub nom. National Right to Work Legal Defense and Education Foundation, Inc. v. AFSCME*, 110 S.Ct. 278 (1989), *cert. denied sub nom.*

---

[7] The only other decision cited by petitioners, *Elvin v. Oregon Public Employees Union*, 102 Or. App. 159, 793 P.2d 338 (1990), *see* Petition at 11, was decided exclusively under state law.

Estate of Gilpin v. AFSCME, 110 S.Ct. 278 (1989); *Hohe v. Casey*, 868 F.2d 69, 73-74 (3d Cir.), *cert. denied*, 110 S.Ct. 144 (1989); *Hohe v. Casey*, 727 F. Supp. 163, 167-68 (M.D. Pa. 1989); *Lehnert v. Ferris Faculty Association*, 643 F. Supp. 1306, 1334-35 (W.D. Mich. 1986); *McGlumphy v. Fraternal Order of Police*, 633 F. Supp. 1074, 1084 (N.D. Ohio 1986).

Because the Sixth Circuit's rejection of petitioners' demand for a full refund of their fair share fees is fully consistent with this Court's decisions and with all relevant lower court precedent, the ruling does not warrant further review.

II. PETITIONERS' CONTENTION THAT THE COURTS BELOW "ABDICATED THEIR JUDICIAL DUTIES" BY ACCEPTING THE IMPARTIAL ARBITRATOR'S DETERMINATION OF THE CHARGEABLE PROPORTION OF THE FAIR SHARE FEES IS WITHOUT MERIT, AND DOES NOT PRESENT A QUESTION THAT IS SIGNIFICANT OR LIKELY TO RECUR

Petitioners contend that "even if complete restitution is not required," the District Court and the Court of Appeals "abdicated their judicial duties" in holding that the amount of the fair share fees that LTA would be required to refund was the amount that the arbitrator determined to be nonchargeable under the LTA collection procedure. *See* Petition at 13-17. The simple—and dispositive—reason why the reference to the arbitrator's determination by the courts below did not constitute an "abdicat[ion]" is that the amount of the fair share fee to be charged to objecting employees was not an issue that was properly before those courts in this case. As the Sixth Circuit pointed out, "plaintiffs do not claim that the decisionmaker's determinations were improper. Rather plaintiffs only object to the use of the procedure." Pet. App. 21a. Petitioners were equally explicit in their brief to the Sixth Circuit, when they stated that their

claims concerned only "procedures" and had "nothing in the world to do with the separate issue of whether or not [petitioners] objected to particular union expenditures." Brief for Appellants at 9.[8]

It is thus clear that the District Court was not required to make a determination itself of the chargeable amount of the fee.

To be sure, if the process LTA used for this purpose was constitutionally impermissible or otherwise likely to result in a miscomputation, petitioners might have had some cause to complain. But that is not what happened. The process that was used by LTA to determine the amount of the fair share fees that could be charged to objectors for each of the years in question (*i.e.*, an arbitrator selected by the AAA) was found by the District Court to be constitutionally adequate, Pet. App. 70a, and petitioners did not appeal that finding. Furthermore, the procedural defects that the courts below did find in the LTA collection procedure were not of such a nature as to have affected the ultimate determination by the arbitra-

---

[8] Although petitioners argue that they should not have been required to "'claim that [the arbitrator's determinations] were improper' on the merits," *see* Petition at 16, quoting Pet. App. 21a, petitioners suggest in footnotes that they did in fact make such a claim. *See* Petition at 16-17, nn.8 and 9. We submit that the courts below correctly construed the complaint and the relevant pleadings in concluding that no such claim had been made. But in all events, petitioners' belief that the courts below misunderstood what they were alleging is not a matter that warrants this Court's attention on *certiorari*.

It also bears mention that, contrary to petitioners' assertion, the Sixth Circuit's observation that petitioners had not "*claimed* that the [arbitrator's] determinations were improper" (emphasis added) did not place any burden of *proof* on petitioners. *See* Petition at 16.

Questions as to whether certain types of union expenditures are chargeable to objecting feepayers will be before the Court this Term in *Lehnert v. The Ferris Faculty Association, MEA-NEA*, No. 89-1217. The Petition in this case does not present any such question, and the questions presented here do not have any relationship to the questions presented in *Lehnert*.

tor. In short, the aspects of LTA's collection procedure that did *not* comport with *Hudson* had no impact on the process for arbitral determination of the amount of the fees, which *did* comport with *Hudson*.[6]

It also is important to make clear the limited purpose for which the court below made reference to the arbitral process. As the Sixth Circuit noted, any objector who believed that he or she was required by the arbitrator's de-

---

[9] Although it might at first glance appear that the inclusion in LTA's 1987-88 collection procedure of the "local union presumption", which the Sixth Circuit found unconstitutional, could affect the arbitrator's computation, this is not in fact the case.

The "local union presumption" operated as follows: in notifying feepayers of the proportion of the fee that LTA had determined was chargeable, LTA did not undertake an audit and analysis of its own expenditures, but assumed that LTA spent the same proportion of its budget on chargeable matters as did its state parent organization, OEA; and detailed information as to *OEA's* finances was provided to all feepayers. *See* Affidavit of Jon A. Ziegler dated December 18, 1987, and exhibits thereto. As the procedure stated, LTA believed that the use of this "local union presumption" would understate the proportion of the fee that was properly chargeable by LTA, because, in reality, "the local and district associations spend a significantly larger percentage of their budget on chargeable expenditures [than does OEA]". *See* Exhibit A to Ziegler Affidavit.

In approving the use of the "local union presumption" for this purpose, the District Court specifically stated that the presumption would not be binding on the arbitrator who would ultimately determine the chargeable amount of the fee. Pet. App. 109a. LTA removed any possible doubt on that score by expressly declaring that it "d[id] not take the position that the procedure requires the arbitrator to accept the local union presumption at all—as a conclusive presumption or even as a rebuttable presumption." Brief of Appellees at 17 n.19. (Thus, the provision quoted in the Petition at 5, stating that the arbitrator will be required to apply the presumption, was not in fact implemented.) Although the Sixth Circuit held that the use of the presumption even for the notice phase of the LTA collection procedure fell short of the "full disclosure of financial information" that the court held was required, Pet. App. 17a, this defect had no impact on the arbitrator's subsequent determination of the amount of the fee.

termination to pay for activities that are not constitutionally chargeable could file a "subsequent § 1983 action" challenging the amount of the fair share fee. Pet. App. 20a, quoting *Hudson*, 475 U.S. at 308, n.21. In such an action, the court would be required to make its own determination as to chargeability, and "[t]he arbitrator's decision would not receive preclusive effect" in that determination. *Id.* This was simply not such an action.

Finally, even if the Sixth Circuit's "reliance" on the arbitrator's determination were not clearly appropriate, petitioners do not present an issue that is significant or likely to recur. Petitioners virtually admit the uniqueness of the issue when they assert that both courts below were guilty of a "judicial abdication," Pet. at 17, "which departs so far from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's power of supervision," *id.* at 13. That indictment is unfounded, as we have shown, and does not warrant a grant of *certiorari.*

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT H. CHANIN
JEREMIAH A. COLLINS *
BREDHOFF & KAISER
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

IRA MIRKIN
GREEN, HAINES, SGAMBATI,
MURPHY & MACALA CO., L.P.A.
P.O. Box 849
Youngstown, OH 44503

* Counsel of Record